United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1717

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

In the Matter of :

UNITED STATES OF AMERICA ex rel.
TIVIS TROIT HAWKINS, II, :

Relator-Appellant, :

-against- : Docket No. 74-1717

J. EDWIN LAVALLEE, Superintendent, :

Respondent-Appellee. :

----------X

BRIEF FOR RELATOR-APPELLANT

ZANE AND ZANE
ATTORNEYS AND COUNSELLORS AT LAW
ONE ROCKEFELLER PLAZA
NEW YORK 10020

212 · 245 · 2222

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

In the Matter of :

UNITED STATES OF AMERICA ex rel. :
TIVIS TROIT HAWKINS, II,
:
Relator-Appellant,
:
-against- Docket No. 74-1717
:
J. EDWIN LAVALLEE, Superintendent,
:
Respondent-Appellee.

----------X

BRIEF FOR RELATOR-APPELLANT

STATEMENT OF THE CASE

This is an appeal from an Order of the United States District Court for the Southern District of New York, Thomas P. Griesa, Judge, filed November 27, 1972, dismissing and denying a petition for a writ of habeas corpus brought on behalf of a state prisoner, the latter claiming that his conviction was obtained in violation of the rights guaranteed him by the United States Constitution.

This brief is submitted on behalf of the relator-appellant in support of reversal and for granting of the writ.

QUESTIONS PRESENTED

1. Was the in-court identification of the appellant by the victim of a violent crime, the only surviving eye-witness, so tainted by impermissible suggestion as to be inherently violative of appellant's right to due process of law?

2. Was the original out-of-court identification procedure, in the absence of counsel, in violation of appellant's constitutional right to counsel?

3. Assuming, arguendo, that counsel was notified and agreed to the uncounseled confrontation, did this, in effect, deprive appellant of the assistance of counsel?

4. Were the totality of the circumstances surrounding appellant's confession such that the state failed to carry its heavy burden of proof as to voluntariness?

5. Was the warrantless search of appellant's home such a lawless infringement on his rights under the Fourth Amendment of the Constitution as to have required the court to suppress the resulting evidence?

6. Did the state fact-finding process adequately determine all the underlying factual disputes necessary for a proper application of the law?

7. On the undisputed facts, is there sufficient evidence that petitioner was deprived of his constitutionally guaranteed right to due process of law to warrant the Court to reverse the order of the District Court and grant the petition for a writ of habeas corpus forthwith?

THE MATERIAL FACTS

Shortly after five o'clock, on the morning of July 17, 1967, a young man driving to work through the town of North Salem, in the County of Westchester, New York, found in the middle of the road, the bleeding and wounded body of a man, later identified as Joseph M. Gagliardi, Jr. The New York State police were summoned to the scene and Gagliardi was removed to Northern Westchester Hospital, where shortly after 6:30 A.M. he was admitted for surgery which was to last about five and a half hours. Before the operation began, however, Gagliardi, who was unable to speak because of a wound which had severed his throat just above the larynx, indicated in response to the questions of doctors that he wanted paper and pencil. On the pad he was given, he wrote the words "Nigger Knife." Following the operation, at about 1:30 P.M., Gagliardi, who had been moved to the recovery room, was allowed to meet with an officer of the State Police for a short time.

The victim, Joseph M. Gagliardi, Jr., twenty-two years old and employed as a truck driver at the time, recovered from his unquestionably serious injury to become the key prosecution witness at the trial of TIVIS HAWKINS. According to his testimony at the trial, he had spent Sunday, July 16, 1967, visiting his brother in South Salem, New York. He had left his brother's house at about

eleven o'clock at night and driven his 1966 yellow Chevelle convertible to a bar and grill known as Sam Ward's in nearby Croton Falls. He drank vodka and 7-Up until about 2:00 A.M. when he left accompanied by Jeanette Steinke, a young woman he knew passingly as someone he had seen on previous occasions at Sam Ward's.

Continuing his testimony, Gagliardi said that as they were proceeding down Route 22 he realized that he had to go to the bathroom, so he pulled off on Deans Bridge Road into a little clearing where he stepped out of the car to urinate. Just as he was about to start the car again, someone approached the left side of the car and announced "This is a stick-up." At the trial, Gagliardi was able to describe the man, who was holding an automatic pistol, only as "colored" [R. 836; A. 1]* and wearing dark glasses. He further testified that the intruder, while pointing the gun at his head, got into the back seat of the car, reached into his pockets and took his money and then directed him to return to Route 22. When they reached the intersection of Deans Bridge Road and Route 22, Gagliardi claimed he saw an unoccupied red Mustang automobile and that he made a mental note of its license number. Gagliardi con-

---

*Parallel references are given first, to pages of the Record on Appeal from appellant's judgment of connection in the State Court (on Exhibit lodged with this Court), and second, to pages of Appellant's Appendix filed herewith.

tinued to drive east at the intruder's directions until they entered a long driveway, which after a steep ride ended at the entrance of a house which they were directed to enter. After his hands were secured behind his back with what Gagliardi thought to be a man's tie, he was taken into a cellar where he was left tied to a steel pole. He left Jeanette Steinke, alive, where she had been directed to lie on the bedroom floor. He never saw her again.

After having been in the cellar for only a few minutes, Gagliardi's testimony continued, the man who had abducted him and Miss Steinke returned to the cellar and "cut my throat". [R. 844; A. 2] After that point he passed in and out of consciousness, but he was aware of being dragged out of the cellar and later of being in the trunk of his own car, which he recognized from material he carried there. He recalled that he was aware of the car coming to a sudden stop and that after he heard the driver of the car walk away he was able to pull himself out through the rear seat of the car. Somehow he managed to get himself through a wooded area back to the road at which point he again lost consciousness. It was apparently shortly thereafter that Gary Casson, the young man aforementioned, arrived on the scene.

Returning to the events which took place in the hospital after Gagliardi was moved to the recovery room, Investigator Conover

of the State Police testified that he arrived at the hospital at approximately 1:30 P.M. and that it was at this time that Gagliardi communicated to him the location he had been taken to the night before and the license plate number and description of the vehicle he had seen the night before at the intersection of Deans Bridge Road and Route 22. A review of vehicle registrations in the County turned up the fact that the car Gagliardi testified to seeing on Route 22 the night before was registered to TIVIS TROIT HAWKINS. Upon Conover's return to the Goldens Bridge police station, three State Police vehicles were dispatched to what ultimately was established to be the estate of Rabbi Maurice Eisendrath. Since there was a chain stretched across the foot of the driveway, the officers walked up the half-mile long driveway to the main house. At a gardener's shed about a hundred feet away from the house, Investigator Conover discovered a mound covered by peat-moss bags and some large gardening equipment. Investigating further he uncovered the body of Jeanette Steinke. It was subsequently determined that she had been beaten to death with a wrench which was found containing no identifiable fingerprints, in an outside tool shed near the house.

Investigator Fairchild and Trooper Herbst then proceeded back down the hill to a garage-apartment structure just inside the entrance to the estate. As they passed the front of the garage they

spotted TIVIS HAWKIN's red Mustang. At this moment, Mrs. Hawkins called out the window to see who was there. Investigator Fairchild asked if Mr. Hawkins was at home. Mrs. Hawkins replied that he was sleeping. According to his testimony he had in fact been in bed naked and had quickly pulled on a pair of work pants in order to answer the door.

From this point it is difficult to recreate the events which followed, since there is conflicting testimony about almost every thing that happened for the remainder of that day. The factual disputes pertaining to the events of the afternoon of July 17, 1967, begin with the question of where TIVIS HAWKINS was standing when he was placed under arrest for murder by Investigator Fairchild. Fairchild testified that he arrested the appellant while the latter was standing in his doorway [R. 614; A. 3], whereas HAWKINS claims that he was arrested outside his home. [R. 934; A. 4] In either event he was removed, in handcuffs, barefoot and unclothed, to the Goldens Bridge Police Station, where he arrived at about 4:00 P.M. After Investigator Fairchild left the appellant in the custody of Trooper Herbst to be taken to the station, Fairchild went back to the main house to advise Investigator Conover of the arrest. Together, they returned to HAWKINS's house where they commenced a search as a result of which they obtained the work shirt the accused

had worn the day before and had left draped on his living room couch when he had gone to bed the night before.

Investigators Fairchild, Curico, Simbari and Maselli were all admittedly involved in the interrogation of HAWKINS at various times. Both Police Officers who took the stand at the suppression hearing testified that he was interviewed by two teams of two Police Officers consecutively. HAWKINS testified specifically that there were more than four [R. 179, 947; A. 5, 6] at any given time and there is uncontroverted testimony that Investigator La Montagne was present in the Detective's office, where the accused was being interrogated, as well [R. 346; A. 7].

Both Investigators Curico and Simbari, who testified for the prosecution said that they had each separately apprised the appellant of his rights under the Constitution and that he had waived such rights by saying that he knew all that and that he did not need a lawyer. [R. 77, 89; A. 8, 9] HAWKINS not only specifically denied this [R. 179, 180, 187; A. 5, 10, 11] but testified to a course of physical and psychological coercion including being grabbed by the throat and choked [R. 178; A. 12]; punched in the head [R. 179; A. 5]; that his bare feet were repeatedly stepped upon [R. 205; A. 13], and threatened that if he did not confess he would be pushed out the side door and shot in the head making

it appear that he had been trying to escape [R. 189; A. 14].

Investigator Simbari testified that upon having received appropriate warnings and having rejected them, HAWKINS simply proceeded to tell him and Investigator Maselli what had occured [R. 89; A. 15]; that Investigator Maselli transcribed this statement in longhand; that it was read back to the accused who thereupon signed it. Investigator Simbari then personally typed-out the hand written statement and summoned a notary public before whom the appellant signed it, swearing that he had given it voluntarily [R. 90-92; A. 16-18].

HAWKINS, on the other hand, testified that he was being told "You did it like this, you did it like this"; that he did not read or know what he was signing [R. 221; A. 19] and that the specific threat that he would be pushed out the side door and shot came in relation to his signing the final typewritten statement before the notary public [R. 180; A. 10] and that in a symbolic act of defiance he printed rather than sign his name to the statement. Furthermore, Ralph Church, the notary public who worked as a custodian for the State Police, testifying for the People, stated in direct contradiction to the testimony of Investigator Simbari [R. 89; A. 15] that HAWKINS's handcuffs were unlocked only after he had asked him to raise his hand to verify the truth of the statement he

was about to sign. [R. 695; A. 20] Mr. Edward Blum, a local attorney who had been called to come to the police station by a concerned neighbor for whom HAWKINS had done general handyman work, and Mr. Ernest H. Rosenberger, the attorney who was retained to represent the appellant at the arraignment later that night, both took the stand to testify that HAWKINS had complained to them, immediately afterwards of the physical abuse he has suffered. Mr. Rosenberger further testified that prior to the arraignment he specifically expressed his concerns about the procedures used to obtain the confession and the identification to Mr. Facelle, the prosecuting attorney. However the confession was in fact obtained, it contained a narrative which differed substantially from the story told by the victim Gagliardi. Though the confession has TIVIS HAWKINS admitting to getting into a car with a man and a woman and later hitting the woman and cutting the man and finally covering up her body with some peat-moss bags, there is no mention of a gun, nor a robbery, nor a motive, and in fact, no evidence of a gun, or the forty-two dollars allegedly stolen from Gagliardi or a motive for TIVIS HAWKINS to have committed this crime ever materialized.

As to the events leading up to HAWKINS being taken to the hospital room of Gagliardi there is also considerable controversy

surrounding the historical facts. The dispute focuses on whether Mr. Blum, the local attorney who had been summoned by the HAWKINS's neighbor, Audrey Haussermann, and who had a short interview with HAWKINS, was informed that the appellant was to be taken to the hospital to be identified by Gagliardi. Mr. Blum testified that at no time was he told by anyone that there were plans to take the appellant to the hospital to be viewed by the victim. Three Police Officers - Investigators Conover [R. 339-343; A. 21-25], La Montagne [R. 345-347; A. 26-28] and Simbari [R. 349-351; A. 29-31] - testified that they had so notified Mr. Blum. In fact, at about 7:00 P.M. TIVIS HAWKINS was taken to Northern Westchester Hospital, where handcuffed and standing between two white policemen, he was presented to Gagliardi as the suspect. Gagliardi, still recovering from the five and a half hour operation performed upon him earlier in the day and the drugs which had been administered up until 3:00 P.M., simply responded by nodding and squeezing the hand of Investigator Conover when HAWKINS was brought to the foot of his bed [R. 387; A. 32].

The arraignment proceedings were conducted in the Town Court in Salem at eleven o'clock that night. At the trial, TIVIS HAWKINS took the stand in his own defense. He continued to assert that his "confession" was coerced and untrue in substance and that he was totally innocent of the charges against him.

POINT I

TIVIS HAWKINS WAS DENIED THE DUE PROCESS OF LAW BECAUSE A KEY ELEMENT OF THE CASE AGAINST HIM, THE IN-COURT IDENTIFICATION, WAS IRREPARABLY TAINTED BY THE SUGGESTIVE OUT-OF-COURT PROCEDURE, WHICH WAS AGGRAVATED BY THE WITNESS'S APPARENT PRECONCEPTIONS TOWARDS MEMBERS OF THE GROUP TO WHICH HAWKINS BELONGS.

In the 1941 case of Lisenba v. People of State of California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed 166 (1941), the Supreme Court affirmed the principle contended for in the present case:

> As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial.
>
> 314 U.S. at 236.

In June of 1967, the Court decided a trio of cases which again reaffirmed the above stated principle and specifically applied it to the context of pre-trial indentification procedures. These three companion cases were United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed2d 1149 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct 1951, 18 L.Ed.2d 1178 (1967), and Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Mr. Justice

Brennan who wrote the majority opinion in each of the cases struck the underlying theme when he stated in Wade that:

> [T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.
>
> 388 U.S. at 228.

The "innumerable dangers" and "vagaries" associated with eyewitness identification of which Justice Brennan speaks are particularly heightened and aggravated in a situation where the witness has been the victim of a violent crime, the trauma of which must undoubtedly leave psychic and physical scars. This, together with any predisposition or bias that the victim may have had towards members of a particular class or group, would go far to create an inhospitable atmosphere for accurate and reliable judgment. To illustrate this point, the Stovall Court cites Palmer v. Plyton, 359 F.2d 199 (4th Cir. 1966), in which the voice indentification of the accused by the complaining witness, a rape victim, was held to deprive the accused of due process of law. The Court stated:

> Any identification process, of course, involves danger that the percipient may be influenced by prior formed attitudes;

> indeed we are all too familiar with instances in which supposedly "irrefutable" identifications were later shown to have been incorrect. Where the witness bases the identification on only part of the suspect's total personality, such as height alone, or eyes alone, or voice alone, prior suggestions will have most fertile soil in which to grow to conviction. This is especially so when the indentifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect.
>
> 359 F.2d at 201.

In the instant case, as in Palmer, the sole identifying characteristic the witness, Gagliardi, was able to describe to the police was the skin color of his attacker; as in Palmer he was presented with no alternative choices and his "predisposition" is amply evidenced by his use of the pejorative, "Nigger" to describe his assailant. In his summation to the jury, the District Attorney, Mr. Facelle said in reference to his leading witness's choice of words:

> [L]adies and gentlemen, would you condemn ...Joe Gagliardi writing the word that he did? Is this a test of this man's character, because he wrote the word that he wrote? Is this the standard by which we are going to measure the truthfulness of Joseph Gagliardi? Would he have been more truthful if he had written 'Negro knife'? [R. 1070; A. 33]

While it is debatable whether Mr. Gagliardi's choice of words is or is not indicative of his character, his choice of words

does indeed give us insight as to the ultimate truth of his statements. To put this in perspective we ask whether it would have seemed as reasonable to the District Attorney if the witness had written "Whitey knife"; whether it is probable that an unprejudiced man - one who previously would not have used a term so denigrating to an entire class of people - would even after such a tragic experience, suddenly shift to the use of language not habitual to him.

It is submitted that these are more than mere idle questions, but that whether Mr. Gagliardi was a prejudiced man goes to the very heart of whether he was capable of making a reliable identification. It is a recognized phenomenon in the behavioral sciences as well as a commonly experienced observation that prejudice - the act of pre-judging people on the basis of attitudes about the group to which they belong - is related to an inability to physically distinguish among them. As one becomes more familiar with individual members of a class of people, one is less likely to prejudge them on the basis of their membership in the class and likewise less likely to see them as "all looking alike." Thus, the probability that an eyewitness identification will produce reliable evidence is, to a large degree, a function of the degree of prejudice - of the proclivity to pre-judge - existing in the witness.

In Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed2d 882 (1966), the Court dealt with the issue of the retroactivity of newly enunciated constitutional guaranties. In this context, the Court stated:

> We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth - determining process of trial.
>
> 384 U.S. at 729.
>
> [T]he question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.
>
> 384 U.S. at 728-729.

In the case at bar, it is urged that both logic and knowledge of human behavior lead to the conclusion that the prejudice of the victim-witness so interfered with accurate perception that the probability that truth could reliably be determined through the challenged procedure was so significantly reduced as to make the identification testimony inadmissible at trial.

The District Court, in its Memorandum Opinion, cited Stovall v. Denno as justifying the State court in "holding that an immediate hospital confrontation between Gagliardi and petitioner was imperative..." [Memorandum Opinion and Order of the District Court 7; A. 34].

It is respectfully submitted, however, that Stovall does not justify such procedures. It in no way weakens or contradicts and, in fact, strongly supports the holdings of its companion case - Wade and Gilbert - in reiterating that "[t]he possibility of unfairness at that point [confrontations for identification] is great..." Stovall held only that the rule of Wade and Gilbert requiring exclusion of evidence tainted by exhibiting the accused to identifying witnesses in the absence of counsel was not retroactive, but that it did apply to confrontations conducted after June 12, 1967; thus applying, as the State court correctly held, to the confrontation herein challenged. That Stovall merely stands for limiting the holding of Wade and Gilbert to cases occurring after the date of these decisions is clearly illustrated by the following statement from Mr. Justice Brennan's opinion:

> [T]he certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situation as different in kind for the purpose of retroactive application...it remains open to all persons to allege and prove as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law.
>
> 388 U.S. at 299.

Having dealt with the retroactivity issue, the Court proceeded tc deal with Stovall's substantive due process claim:

> We turn now to the question whether petitioner, although not entitled to the application of Wade and Gilbert to his case is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. (Emphasis added).
>
> Id., at 301-302.

The Court then went on to determine that in the case of Stovall there were imperative circumstances which under the totality of the circumstances then present, justified the identification procedure there utilized and that the situation in that case did not justify finding a violation of Stovall's constitutional rights. Stovall clearly fits into the line of cases which were concerned with protecting the integrity and reliability of the fact-finding process through the protection of the Due Process clause of the Fifth and Fourteenth Amendments. There is no indication in its language or in the language of subsequent cases that the factual finding of imperative circumstances in the case of Stovall was ever

intended to become a rule of law.

Thus, in Neil v. Biggers, 409 U.S. 188, 196, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) the Court explained that the Stovall Court "held that the defendant could claim that 'the confrontation conducted... was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.' This, we held, must be determined 'on the totality of the circumstances.'"

In Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), one of the four cases reviewed in Neil v. Biggers, the Court held the identification "'all but inevitable' under the circumstances." In Foster a positive identification of the accused was obtained only after he was presented to the witness in a second line-up, when he was the only person who had appeared in the first, the Court reaffirmed and cited to its holding in Stovall that "judged by the 'totality of the circumstances,' the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law." 394 U.S. 442. The Court found the procedure in Foster "so undermined the reliability of the eyewitness identification as to violate due process" since, "the pretrial confrontations clearly were so arranged as to make the resulting identification virtually

inevitable." Id. at 443. In a footnote, the Court amplified on its prior holdings:

> The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury. But it is the teaching of Wade, Gilbert, and Stovall that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law. (Emphasis added)
>
> Id. at 442 n. 2.

On the basis of its review of preceding cases, the Court in Neil v. Biggers summarized:

> Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' [Citation omitted] While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in Foster. Suggestive confrontations are disapproved because they increase the likelihood of misidenti-

> fication, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.
>
> 409 U.S. at 198.

The Court went on to explain that because of timing it found in the case before it at that time that it was not requisite to exclude the evidence, although the identification was improper:

> The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, not because in every instance the admission of evidence of such a confrontation offends due process. [Citations omitted] Such a rule would have no place in the present case, since both the confrontation and the trial preceded Stovall v. Denno, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury. (Emphasis added).
>
> Id. at 198.

Again in Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), while holding that Wade did not require per se exclusion of testimony relating to a pre-trial identification in the absence of counsel, the Court held open the invitation to argue that the procedure in its totality was a violation to the concept of due process:

> What has been said is not to suggest that there may not be occasions [during the course of a criminal investigation]

> when the police do abuse identification procedures. Such abuses are not beyond the reach of the constitution. As the Court pointed out in Wade...it is always necessary to 'scrutinize any pretrial confrontation...' The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. [Citations omitted]
>
> 406 U.S. at 690-691.

Thus, every subsequent decision dealing with admissibility of testimony relating to an out-of-court identification has taken as its starting point the underlying purpose of Wade. Throughout, Mr. Justice Brennan's decision is illuminated by the concern for maintaining the reliability of the fact-finding process by minimizing the likelihood of mistake fostered by the power of suggestion:

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witness for pretrial identification...'[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor - perhaps it is responsible for more such errors than all other factors combined.' Suggestion can be created intentionally or unintentionally in many subtle ways.
>
> * * *
>
> Moreover, '[i]t is a matter of common experience that once a witness has picked

> out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may ...for all practical purposes be determined there and then, before the trial.
>
> * * *
>
> The pretrial confrontation for purpose of identification may take the form of a lineup...or presentation of the suspect alone to the witness, as in Stovall v. Denno. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eye-witness identification.
>
> * * *
>
> The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecution and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives. [Citations omitted] (Emphasis added).
>
> U.S. at 229-230.

The Wade decision refers specifically to the hospital-room identification procedure in Stovall, so similar to the one utilized to produce the identification of HAWKINS. Of this procedure, Mr. Justice Brennan, speaking for the Court in Wade, said:

> [T]he vice of suggestion created by the identification...was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police.
>
> Id. at 234.

As stated above, Stovall held that the rule of Wade would not be applied retroactively to confrontations conducted before June 12, 1967. It nevertheless held open a claim based on an alleged violation of due process of law in the conduct of a confrontation, depending on "the totality of the circumstances surrounding it." 388 U.S. at 302. In Stovall the Court held that on the record of that case, the facts did not show such a violation of due process. The totality of the circumstances test, in the case of TIVIS HAWKINS, leads inexorably to a different conclusion. In the case of TIVIS HAWKINS, which under the appropriate rule of law is the only case that matters, in addition to the traumatic experience of being the victim of a vicious attack, the witness had given demonstrable evidence of his racial prejudice. The denial of the due process claim in Stovall, therefore, cannot serve as precedent where, as here, there is a clear and unavoidably telling clue that the identification, so lacking in procedural safeguards, was inherently unreliable.

In his colloquy to the Court at the supression hearing, the prosecuting attorney challenged defense counsel's suggestion that the police should have at least presented the witness-victim with alternate Negro "suspects" by arguing that this would not have been easily accomplished:

> [I]t's just not a question as counsel would state, so simply, of having a Negro there or other Negroes. We must further refine it. There must be other Negroes

> of the approximate age of the defendant, other Negroes of the approximate height of the defendant, other Negroes of the approximate weight of the defendant, other Negroes of the approximate attire of the defendant. [R. 394; A. 35].

Thus, the prosecutor puts forth the circuitous argument that since it was not possible to "refine" the procedure, it was justifiable to have no procedural safeguards at all. It seems to be elementary logic that any show-up procedure presenting more than one person - even if that one other person had been seven feet tall and purple - would have had to produce greater reliability, in that it would at least have forced the witness to make an active choice, rather than to merely acquiesce to the suggestion of the police.

The Court in Wade sounded a strong call for just such safeguards as HAWKINS's defense counsel argued should have been present at the identification and which the prosecutor argued would have been too difficult to arrange:

> [E]ven though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. [T]he first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification....The trial which might determine the accused's fate may well not be that in the courtroom, but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, in-

> tentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness - 'that's the man.'
>
> 388 U.S. at 235-236.

Thus, in the instant case, the issue is not as the Relator-Appellant, choosing to join the issue with the prosecutor, argued in his pro se application below. Whether or not the circumstances were imperative - whether or not it appeared subjectively to the attending doctor that the witness might die - the only issue is whether the identification in the hospital room created a situation whereby it was inevitable that the victim would point to the one black man brought in by the police in handcuffs and say, "that is the man!" The only concern in this case should be that the Relator-Appellant has been convicted and has in fact been in prison for the past seven years, primarily on the basis on an identification procedure which so violated the concept of basic fairness inherent in the meaning of due process that no one reading the record of this case can but wonder if the Relator-Appellant is not "paying the price" for being the first and only "Nigger" unfortunate enough to be brought before the complaining witness; a witness who had that very day had his throat "cut" [R. 844; A. 36] by someone who he had described as a "Nigger." United States v. Casscles, 358 F. Supp. 517 (E.D.N.Y. 1973) was a case involving a substantially

similar issue to the one at bar; whether a photographic identification procedure was impermissibly suggestive and gave rise to substantial likelihood of irreparable misidentification. The primary witness in this case also had spent the evening in a bar where she had been drinking and her opportunity to see the petitioner was primarily on a dark street, illuminated by some street lights. Indeed, there were many factual differences as well, all of which added to the enormity of the violation in terms of due process, just as the particular facts in the HAWKINS case added to the basic affront it presented to the concept of due process.

What makes Casscles worthy of note is that, just as in the case at bar, all the evidence leading the District Court to conclude that "the identification procedure was impermissibly suggestive and that under the totality of the circumstances. [the procedure]...gave rise to a substantial likelihood of irreparable misidentification so that the in-court identification should have been excluded" was available and known to the New York trial court at the Wade hearing. Similar to the instant case, the trial court held that "the identification was not tainted and was admissible at trial" 358 F.Supp. at 519; parallel to the instant case, the petitioner was convicted at trial, the judgment of conviction was affirmed, without opinion, by the Appellate

Division and the Court of Appeals denied leave to appeal. Unlike the instant case however, the District Court of the Eastern District of New York held that the petitioner's right to due process of law had been violated by the in-court identification and that his conviction must be set aside. We believe the contrary ruling below in this case to be improper and without basis.

POINT II

TIVIS HAWKINS, UNDER THE LAW AS IT HAD BEEN INTERPRETED IN UNITED STATES v. WADE, DECIDED ONE MONTH EARLIER, HAD A CONSTITUTIONALLY PROTECTED RIGHT TO THE ASSISTANCE OF COUNSEL AT PRE-TRIAL CONFRONTATION WITH THE WITNESS-VICTIM. THIS CONSTITUTIONAL GUARANTEE RAN DIRECTLY TO THE RELATOR-APPELLANT AND COULD NOT BE WAIVED BY COUNSEL.

One month prior to the scene conducted by the police in Joseph Gagliardi's hospital room, Justice Brennan had stated in Wade:

> [T]he principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. (Emphasis in original)
>
> 388 U.S. at 227.

The Wade decision continued by explaining that a pre-trial proceeding is a "critical stage" if "the presence of...counsel is necessary to preserve the defendant's...right meaningfully to cross examine the witnesses agasinst him and to have effective assistance of counsel at the trial itself."

In Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), the Supreme Court limited the rule of Wade and Gilbert to apply only to post-indictment confrontations. This limitation, however, had not been established at the time the events here took place and thus was not the law at that time. Aside from this procedural point, the logic of Kirby in no way conflicts, but in fact endorses the argument here presented because in holding that Wade did not require per se exclusion of testimony as to a lineup conducted without notice to and in the absence of counsel, it did not say that under no circumstances, did an accused have a pre-indictment right to counsel. The Kirby opinion, in fact, supports Mr. Justice Brennan's statement in Wade, that the Sixth Amendment "encompasses counsel's assistance whenever necessary to assure a meaningful 'defense'". 388 U.S. at 225.

In Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the Court spoke what was to become a classic statement on the issue of waiver:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel, must defend, in each case, upon the particular facts and circum-

> stances, surrounding that case, including the background, experience, and conduct of the accused.
>
> 304 U.S. at 464.

In Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) the Court stated:

> Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

This statement was made in the context of the Court's examination of the voluntariness of a guilty plea. One of the factors which the Court considered in coming to the determination that Brady's plea was intelligently made was that "[h]e was advised by competent counsel." In the case at bar, the prosecutor alleged and the United States District Court apparently agreed that even though the applicable law at the time of the hospital room confrontation was that stated in Wade, entitling the accused, as a matter of constitutional law, to the assistance of counsel at the identification show-up, this right was presumably waived by the lawyer who allegedly agreed to let the defendant go the hospital without him.

The attorney in question, with no apparent motive to lie, has denied this. In view of Mr. Blum's testimony to the effect that he did not know the defendant was to be taken to the hospital

one could hardly reasonably agree that the defendant's constitutional right to a fair trial, as this right was to be protected by the rule of Wade, was waived "intelligently" by the attorney purportedly representing him. This leads to the inexorable conclusion that either the accused was not represented by counsel at all at this "critical stage of the prosecution [Wade 388 U.S. at 236], at which his fate may very well have been determined, or that the attorney purportedly representing him was so incompetent that, in practical effect, it was the same as not being represented at all." The first alternative is being dealt with here. Mr. Justice White has said:

> Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights.
>
> Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) (dissenting opinion at 499).

The Court in Schneckloth v. Bustamonte, 412 U.S. 248, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), extensively reviewed the concept of waiver in the criminal law context and in refusing to apply a strict standard of voluntariness to consent in a search and seizure situations, reaffirmed the necessity of an informed consent in situations where any lesser standard would call into question the reliability of the fact-finding process. The Court stated:

> A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that

> he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. A prime example is the right to counsel. For without that right, a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted.
>
> * * *
>
> The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial.
>
> 412 U.S. at 242.

The Schneckloth Court in distinguishing between a valid waiver in the context of a fair criminal trial and in the context of a search and seizure situation, pointed out that "the protection of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." It was because, "there is no likelihood of unreliability or coercion present in a search-and-seizure case", that the Court in Linkletter v. Walker, 381 U.S. 618, 638, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), declined to apply the exclusionary rule of

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1614, 6 L.Ed.2d 1081 (1961), retroactively. In Schneckloth, the Court reemphasized the distinction made in Linkletter between those constitutional issues dealing with arbitrary police behavior as opposed to those that went to "the fairness of the trial - the very integrity of the fact-finding process." 381 U.S. at 639. The Fourth Amendment, the Court said in Tehan v. United States, ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), "is not an adjunct to the ascertainment of truth" (emphasis added) contrasting it to those Amendments which did serve such purpose and therefore required even greater protection. Again, contrasting the purpose of limiting the circumstances under which the police can conduct a search to the purpose of guaranteeing a fair trial, the Schneckloth Court said: "[U]nlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment." 412 U.S. at 243.

The underlying theme which informs the Court's decision in Schneckloth throughout, is that certain of the constitutional guarantees in the criminal law area, in addition to limiting arbitrary police power, serve the additional and ultimate purpose of insuring the reliability of the fact finding process. This is also the pur-

pose which provided the rationale for the decisions in Wade and Gilbert, and it is this very purpose which was so seriously undermined by the hospital room identification procedure without even the minimal protection for the integrity of the fact-finding process which an attorney might have provided. Mr. Justice Stewart in his concurring opinion in the recent case of United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 153 (1973), explains his understanding of the Wade decision as follows:

> The Court held...that counsel was required at a lineup, primarily to insure that defense counsel could effectively confront the prosecution's evidence at trial. Attuned to the possibilities of suggestive influences, a lawyer could see any unfairness at a lineup, question the witness at trial, and effectively reconstruct what had gone on for the benefit of the jury or trial judge.
>
> 93 S.Ct. at 2581.

While joining the majority opinion in Schneckloth, Mr. Justice Powell in a wide ranging and historically grounded concurring opinion focuses on the "extent to which federal habeas corpus should be available to a state prisoner seeking to exclude evidence ...." (Concurring opinion of Mr. Justice Powell, 412 U.S. at 250) As in the majority opinion of Mr. Justice Stewart, the opinion is grounded in distinguishing the scope of the writ in regard to claims based on the justice - the reliability - of the confinement, as op-

posed to those claims where "a convicted defendant is asking society to re-determine a matter with no bearing at all on the basic justice of his incarceration." Id. at 256. In attempting to limit the use of the writ and draw a rational line for determining when it is an appropriate and necessary device for a state prisoner, Justice Powell states:

> Recent decisions...have tended to depreciate the importanceof the finality of prior judgments in criminal cases. This trend may be a justifiable evolution of the use of habeas corpus where the one in state custody raises a constitutional claim bearing on his innocence. But the justification for disregarding the historic scope and function of the writ is ...less apparent in the typical Fourth Amendment claim....
>
> 412 U.S. at 257.

Continuing, Justice Powell quotes from the dissenting opinion in Kaufman v. United States, 394 U.S. 217, 242, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969) in which Mr. Justice Black said:

> I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt.

Such is the case of TIVIS TROIT HAWKINS - a case filled with circumstantial evidence and gaping holes in both substantive evidence and logic, and built in large measure on an eyewitness identification made so inherently unreliable by the victim's physical

state, the traumatic experience he had undergone and his evident racial prejudice that it seemed almost a situation designed to create a mistaken identification. Such an extraordinary violation of both TIVIS HAWKINS's constitutionally guaranteed right to due process of law and the integrity and reliability of the fact-finding system itself, calls for the extraordinary remedy of habeas corpus reveiw. In the context of arguing against the escalating use of habeas corpus in the area of allegedly unreasonable search and seizure, Mr. Justice Powell explained:

> [T]he question on habeas corpus is rarely whether the prisoner was innocent of the crime for which he was convicted and too frequently whether some evidence of undoubted probative value has been admitted in violation of an exclusionary rule ritualistically applied...(concurring opinion of Mr. Justice Powell) 412 U.S. at 275-276.

The instant challenge to the suggestive and misleading identification procedure, so susceptible to a mistaken identification, is clearly within the scope of habeas review outlined by Justice Powell exactly because the evidence thus produced is so inherently unreliable that it has no probative value.

According to the opinion of the Court in United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 153 (1973), the Court in Wade "held that a lineup constituted a trial-like confrontation"

and that this provided the rationale for the requirement of the assistance of counsel. Within this context, the Ash Court said:

> The function of counsel in rendering "Assistance" continued at the lineup under consideration in Wade and its companion cases. Although the accused was not confronted there with legal questions, the lineup offered opportunities for prosecuting authorities to take advantage of the accused. Counsel was seen by the Court as being more sensitive to, and aware of, suggestive influences than the accused himself, and as better able to reconstruct the events at trial. Counsel present at lineup would be able to remove disabilities of the accused in precisely the same fashion that counsel compensated for the disabilities of the layman at trial. Thus the Court mentioned that the accused's memory might be dimmed by 'emotional tension,' that the accused's credibility at trial would be diminished by his status as defendant, and that the accused might be unable to present his version effectively wihtout giving up his privilege against compulsory self-incrimination. [Citation omitted] It was in order to compensate for these deficiencies that the Court found the need for the assistance of counsel.
>
> 93 S.Ct. at 2575.

Ash continued by stating that the "traditional test" for the Sixth Amendment counsel guarantee is based on:

> Examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary.
>
> Id.

In the case presently under appeal, had counsel been present at the confrontation, the scene in the hospital room and the demeanor of the participants - the victim, the accused and the police officers - would undoubtedly have helped an attorney gain sufficient insight to determine the degree of suggestiveness present in the situation and to formulate meaningful questions for cross-examination at trial. Thus, the case fits squarely within the above stated standard, as it was articulated by Mr. Justice Blackmun. In refusing to extend the holding in Wade to the post-indictment photographic display which was being challenged in Ash, Mr. Justice Blackmun explained that the distinction being drawn was based on whether there would be an opportunity to cure the defect of a faulty and unduly suggestive confrontation at trial through an accurate reconstruction of the event. As support for this rationale, Ash drew on the language in Wade itself, in which Mr. Justice Brennan was explaining the Court's holding:

> 'The pretrial confrontation for purpose of identification may take the form of a lineup also known as an 'identification parade' or 'show-up,' as in the present case or presentation of the suspect alone to the witness, as in Stovall v. Denno. It is obvious that risks of suggestion attend either form of confrontation.... But as is the case with secret interrogations, there is obvious difficulty in depicting what transpires at lineups and

> other forms of identification confrontations.' 388 U.S. at 299-330, 87 S.Ct. at 1933. (Emphasis in original).
>
> Id. at 2576 n. 9.

Justice Stewart, concurring in Ash also distinguished the situation of the photographic identification from that of the "little drama" of a live line-up, "for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial." Id. at 2580-2581. On the other hand, when the "drama" is live and no attorney for the accused is present, "defense counsel at trial could seldom convincingly discredit a witness's courtroom identification by showing it to be based on an impermissibly suggestive lineup." Id. at 2580. Explaining the decision in Wade further, Justice Stewart continued:

> The Court held, therefore, that counsel was required at a lineup, primarily as an observer, to insure that defense counsel could effectively confront the prosecutor's evidence at trial. Attuned to the possibilities of suggestive influences, a lawyer could see any unfairness at a lineup, question the witnesses about it at trial and effectively reconstruct what had gone on for the benefit of the jury or trial judge.
>
> Id. at 2581.

Mr. Justice Brennan, dissenting in Ash, also attempts to clarify, as had the majority, that the presence of counsel at the

lineup is necessary "to protect the fairness of the trial itself." [Citation omitted] (emphasis in original). Thus, he cites Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) which "made clear that an arraignment...is a 'critical stage' of the prosecution, not only because the accused at such an arraignment requires 'the guiding hand of counsel,' but, more broadly, because '[w]hat happens there may affect the whole trial." 368 U.S. at 54.

Responding to this argument, as the prosecution did, by stating that the attorney on the scene at the time knew of the planned hospital room confrontation and did not ask to go along, completely avoids dealing with the underlying rationale of the decisions on right to counsel; that presence of the attorney acts as a check on the basic reliability of the identification by providing him with the tools to conduct a more meaningful cross-examination. The decision in Wade which represents the applicable law in this case recognized the dangers of mistaken identification inherent in an improperly controlled identification procedure. It called upon the Sixth Amendment guarantee of right to counsel as a means of strengthening the reliability of the process by inserting into it an observer who could later question the conduct and fairness of the proceeding; an observer who as an officer of the court has the dual responsibility of protecting the rights of his client as well as the

integrity of the fact finding process upon which the courts rely in the search for justice. Surely, when the very reliability of the fact-finding process is called into question by the violation of the appellant's constitutional right to counsel and to due process of law, such an argument cannot be cavalierly brushed aside with the suggestion that the attorney simply chose not to go, particularly in view of that attorney's express denial that he was notified of the pending hospital room confrontation. Indeed, on the basis of the prosecution argument, there are only two viable conclusions to be drawn! One is that the attorney, an officer of the court, violated his oath as well as the ethical cannons of his profession. The second, is that he was either grossly negligent or incompetent, or both. But in any event, the result is the same: HAWKINS was deprived representation by competent counsel.

POINT III

ASSUMING ARGUENDO THAT THE FACTS WERE AS PRESENTED BY THE POLICE AND THAT THE INACTION OF THE ATTORNEY AT THE SCENE DID CONSTITUTE A VALID WAIVER OF TIVIS HAWKINS'S RIGHTS, THE ATTORNEY WAS GROSSLY NEGLIGENT AND THEREFOR RELATOR-APPELLANT WAS IN EFFECT DEPRIVED OF HIS RIGHT TO THE ASSISTANCE OF COUNSEL.

In United States ex rel. Washington v. Maroney, 428 F.2d 10 (3d Cir. 1970), the relator alleged that his assigned Legal Aid attorney, who only consulted with him for a period of ten minutes, prejudiced his case by his failure to impeach the key government witness, the Court said:

> Whether counsel is appointed or retained, a defendant has the right to have effective aid....As the Supreme Court emphasized in Avery v. Alabama, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940), 'the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.' This Court has emphasized that there is a difference between technical representation and meaningful assistance. United States ex rel. Carey v. Rundle, 409 F.2d 1210 (3d Cir. 1969), 428 F.2d at 13.

Since in the case of TIVIS HAWKINS, here at issue, the crucial hospital room identification affected the reliability, the in-

tegrity and the fundamental fairness of the fact finding process itself, counsel's absence was as critical as if he had been absent from the courtroom itself. Indeed, his subsequent presence in the courtroom could not mitigate the affects of that misleading and suggestive procedure. Thus the representation TIVIS TROIT HAWKINS had at the trial was indeed as much of a sham as the mere technical representation accorded to Washington.

The Second Circuit, per Judge Waterman, has also dealt with the question of whether a convicted accused, whose retained counsel failed to perfect a meritorious appeal, has been denied the effective assistance of counsel. In United States v. Reincke, 383 F.2d, 129 (2d Cir. 1967), the Court noted the criteria which had been applied to such determinations in the past:

> In order to assume constitutional proportions, "a lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.' United States ex rel. Boucher v. Reincke, 341 F.2d 977, 982 (2d Cir. 1965); quoting from United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586 (1950). If counsel's representation is so 'horribly inept' as to amount to 'a breach of his legal duty to faithfully to represent his client's interests,' Kennedy v. United States, 259 F.2d 883, 886 (5 Cir. 1958), cert. denied, 359 U.S. 994, 79 S.Ct. 1126, 3 L.Ed.2d 982

> (1959), there has been a lack of compliance with the fundamental fairness essential to due process.
>
> 383 F.2d at 132.

On the basis of these standards it was found that "counsle's conduct effectively deprived...[the relator] of his right to appeal as well as his right to the assistance of counsel on appeal." The Court continued:

> This is not a case where hindsight reveals tactical or strategic errors 'over which conscientious attorneys might differ.' United States v. Garguilo, 324 F.2d 795, 797 (2 Cir. 1963) [Other citations omitted] for...[the attorney] could not seriously have hoped to further his client's interests in the case....
>
> Id.

Again, one must ask if any less can be said in the case of TIVIS TROIT HAWKINS. It is beyond the realm of speculation that any competent attorney - even an attorney who had been suddenly called to the station house by a concerned neighbor of Mr. Hawkins and who had not yet even seen his "client" - would allow his handcuffed, black client to be taken to the hospital room for an identification by a man who had that day had his throat slashed from ear to ear by a man he identified only as a "Nigger." Any effective criminal attorney - undoubtedly even a court appointed Legal Aid attorney - would have known of the Supreme Court's landmark decision in Wade, Gilbert and Stovall v. Denno, decided only the previous

month, in which the Court clearly articulated the infirmities and lack of reliability inherent in traditional police conducted identification procedures. With the clarion call of these decisions ringing fresh in the ears of any lawyer concerned with the protection provided to his client by the United States Constitution, it is beyond the bounds of reason and logic to argue, as did the District Attorney at the suppression hearing, that Mr. Blum, the attorney in question, perhaps wanted the defendant to be viewed by the victim because in this way he would be exonerated [R. 357; A. 37]. Relator-Appellant respecfully suggests that this, had it been the motivation of Mr. Blum, would indeed have been an expensive way to obtain exoneration, since his exoneration would not have been precluded at a fair and non-suggestive lineup and certainly would not have been precluded by the presence of counsel at such a proceeding. Such argument is so lacking in merit that one is left to conclude that either Mr. Blum was not in fact notified of the pending hospital room identification and thus did not agree to it (as was then essential under the standard which had been articulated in Wade), or that Mr. Blum was so grossly incompetent that he would have risked his client's fate and right to due process of law to such an inherently unreliable procedure. If the latter explanation is chosen, the lack of effective assistance would indeed "be of such a kind as to shock the conscience of the Court and make

the proceedings a farce and mockery of justice." United States ex rel. Boucher v. Reincke, 341 F.2d 977, 982 (2d Cir. 1965).

The Ninth Circuit in Brubaker v. Dickson, 310 F.2d 30 (1962) cert.denied 372 U.S. 978, 83 S.Ct. 1110, 10 L.Ed.2d 143 (1963) further summarized the right to the effective assistance of counsel as follows:

> The test to be applied in determining the legal adequacy of the allegations of appellant's petition is readily stated: 'The requirement of the Fourteenth Amendment is for a fair trial'; the due process clause 'prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right' compliance with this standard required that appellant, charged with a capital offense, be represented at trial by counsel.
>
> But the constitutional requirement of representation at trial is one of substance, not of form. It could not be satisfied by a pro forma or token appearance. Appellant was entitled to 'effective aid in the preparation and trial of the case.'
>
> This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance.' Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings' and in all the attending circumstances, there was

> a denial of fundamental fairness; it is inevitably a question of judgment and degree [Citations omitted].
>
> 310 F.2d at 37.

There is little doubt that under some circumstances ineffective assistance of counsel may rise to a violation of federal constitutional rights [Ellis v. United States, 356 U.S. 674, 2 L.Ed.2d 1060, 78 S.Ct. 974 (1958)].

As early as 1932, the Supreme Court in Powell v. State of Alabama, 287 U.S. 45, 58, 53 S.Ct. 55, 60, 77 L.Ed. 158 (1932) said that "the appearance [of the counsel] was rather pro forma than zealous and active" and that under such circumstances "defendants were not accorded the right of counsel in any substantial sense." The Court continued that, [t]o decide otherwise, would simply be to ignore actualities." To decide in the case of TIVIS HAWKINS that his right to the assistance of counsel at the "drama", which very well may have determined his fate at the trial, was waived so casually by an attorney who expressly denied doing so, and to call this anything but gross incompetence would be equally to deny reality.

POINT IV

THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING TIVIS HAWKINS'S CONFESSION WAS SUCH AS TO CAST SERIOUS DOUBT UPON WHETHER THE STATE HAS MET ITS BURDEN OF PROOF AS TO VOLUNTARINESS.

An early case dealing with the issue of waiver of constitutional rights and one that the Court has consistently relied upon is Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) which stated, inter alia:

> '[C]ourts indulge every reasonable presumtion against waiver' of fundamental constitutional rights and...we 'do not presume acquiescence in the loss of fundamental rights.'
>
> 304 U.S. at 464.

In the more recent Schneckloth case, 412 U.S. 2181, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the Court reviewed the concept of "waiver" as it had developed in relation to constitutional rights, explaining that "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." 412 U.S. at 237. The Court continued:

> The guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial, and any alleged waiver must meet the strict standard

> of a 'known' right. But the 'trial' guarantees that have been applied to the 'pre-trial' stage of the criminal process are similarly designed to protect the fairness of the trial itself.
>
> Id. at 238.

It was on this basis, the Schneckloth Court explains, that the Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), found "the standards of Johnson...to be a necessary prerequisite to finding of a valid waiver." Schneckloth (at 240), specifically citing Johnson v. Zerbst the Miranda Court had said:

> This Court has always set high standards of proof for the waiver of constitutional rights and we re-assert these standards as applied to in-custody interrogation.
>
> 384 U.S. at 475.

Continuing its analysis, the Schneckloth Court points out that there are differing standards for the determination of "consent" depending upon whether the person consenting has been placed into custody or is simply the subject of an, as yet, unfocused police investigation. It noted that even in the context of consent to a search the less stringent requirements which attach thereto, "other courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody." 412 U.S. at 240 n. 29.

Obviously, in the case of self-incriminating statements made where a person is in custody, these "heightened possibilities for coercion" have been resoundingly pointed out by the Court in Miranda, explaining that, "interrogation is psychologically rather than physically oriented....'and the blood of the accused is not the only hallmark of an unconstitutional inquisition.'" [Citation omitted] 384 U.S. at 448. In a lengthy review of the type of modern, more subtle psychological techniques used by the police to obtain confessions the Court refers to the case of Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945), as illustrating one variant of these techniques that of "engendering fear." Miranda, 384 U.S. at 452 n. 17. In Malinski, a case in which the accused was, among other things, interrogated while only partially clothed and with only a blanket in which to wrap himself, the total police interrogation procedure was found to be a violation of due process.

The psychological effects on a man of being naked and barefoot while all around him people are dressed - not to mention that he is black, and they are all white, that he is in handcuffs, and that they are police - are thus not unknown in the law. One must therefore wonder why the appellant in the instant case was not given the elementary dignity of being permitted to put on at least shoes and socks and a shirt before being taken to the police station. If

this omission was by design, rather than by chance, which it was, then this poisoning of appellant's will is obvious. In his argument to the State court on the motion to suppress the confession, the prosecuting attorney stated, as regards this issue: "What bearing this has as perhaps to the psychological coercion ...is minimum." [R. 289; A. 38] Apparently, this evaluation of the psychological effect of such exposure is not generally shared by prosecutors. The Malinski Court quoted with distaste from the prosecutor's own words, in his summation to the jury:

> Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology - let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking.
>
> 324 U.S. at 407.

Finding the total procedure reflected by this attitude to be in violation of due process, the Court further stated that a coerced or compelled confession, "may not be used to convict a defendant and if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict." [Citations omitted] Id. at 404. Mr. Justice Frankfurter, amplified upon the Court's holding in his concurring opinion:

> [W]hen a conviction in a state court is properly here for review, under a claim that a

> right protected by the Fourteenth Amendment has been denied....the question is not whether the record permits a finding, by a tenuous process of psychological assumptions and reasoning, that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined.
>
> Id. at 416.

In the somewhat more recent case of Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961), the Court again dealt with the problem of voluntariness of a confession and this time specifically stated that in addition to the physical facts, the courts must examine the psychological facts, "because the concept of 'voluntariness' is one which concerns a mental state...of internal 'psychological' fact." 367 U.S. at 603. Mr. Justice Frankfurter, who wrote one of four separate opinions holding the confession obtained was involuntary said that although the "crude historical" phase of an inquiry into the voluntariness of a confession is "normally" determined by "the highest Court of a State in which review may be had" the State court's "inferences" as to the subjective mental state of the accused may not be used to preclude review by a federal court. Justice Frankfurter continued by outlining the role of the federal courts when a confession is challenged on the ground of psychological coercion as it was in Culombe and as it is

in the present case of HAWKINS:

> No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially - that is, by inference, and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel. Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate with due regard to federal-state relations, that the state court's determination should control. But where, on the uncontested external happenings, coercive forces set in motion only by state law enforcement officials are unmistakably in action; where these forces under all the prevailing states of stress are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process - where this is all that appears in the record - a state's judgment that the confession was voluntary cannot stand.
>
> '[I]f force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.' [Citation omitted].
>
> 367 U.S. at 605-606.

A 1969 New York case, People v. Yukl, 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256 N.E.2d 172 (1969) dealt with what the Court in Culombe had termed the "dilemma posed by police interrogation of suspects in custody and the judicial use of interrogated confessions. [367 U.S. at 587], and the four-to-three decision of the New York Court of Appeals reflected the tension created by the "responsibility of the police for ferreting out crime with the right of the criminal defendant, however guilty, to be tried according to constitutional requirements." [367 U.S. at 569]. The four judge majority found the challenged confession to be voluntary on the narrow ground that Miranda warnings are required only at the time of a person is taken into custody or otherwise deprived of his freedom and the accused's confession was the product of a "pre-custodial" police station "interview." Judge Breitel, wrote the ringing dissent. Referring to the unclothed condition of the accused - his shoes and trousers had been taken from him during the "interview" for closer examination when he made his confession, Judge Breitel said:

> He was shoeless, without trousers or undershorts, before he was given the mandated warnings. If what preceded immediately and what followed the giving of the warnings can be found to be a voluntary waiver of constitutional rights and a voluntary submission to police interrogation, legal analysis becomes divorced from reality and the credible events.
>
> 25 N.Y.2d at 592.

Stating facts highly reminiscent of the facts in the instant case, Judge Breitel emphasizes that "[a] man, shoeless and all but naked, separated from his wife who is elsewhere in the station house, alone, except for interrogating policemen" is in no "condition to make an intelligent, knowing, and voluntary waiver, even if the Miranda warnings are eventually given before admissions are made." 25 N.Y.2d at 598. Judge Breitel ends his opinion with a reminder:

> It is stating what is unnecessary that however repulsive and serious the crime, however patently guilty the defendant, the police interrogation process in this case, however zealously motivated, did not yield, under current mandated standards, evidence admissible in a Court of law. 25 N.Y.2d at 599.

People v. Yukl is frequently cited in New York cases. It is however, invariably cited in cases dealing with the issue of determining whether the defendant was in custody prior to receiving Miranda warnings. In the case at bar this is obviously not the issue. TIVIS TROIT HAWKINS was already under arrest. The testimony of his interrogators, which he contests, is that he received the appropriate warnings. Thus, the only issue is the one upon which Judge Breitel would have decided Yukl; whether under the circumstances described it is possible "to conclude on any rational or credible basis that constitutional standards have been satisfied."

25 N.Y.2d at 597. Thus, the Judge concluded:

> [T]he warnings were given, and the waiver signed, as Yukl, at police request, sat without shoes, trousers or jockey shorts, a circumstance that necessarily nullified, even if without design on the part of the police, the possible effectiveness of any recitation of Yukl's civil rights. Indeed, the situation as described, and even if fully credited, is a burlesque of advice concerning the constitutional privileges. It hardly suggests an appropriate context for a 'voluntary knowing and intelligent waiver' of defendant's privilege against self-incrimination or the right to counsel.
> 25 N.Y.2d at 595-596

As has been pointed out above, however, the violation of federal constitutional rights is a matter for the federal courts. Thus, in Swenson v. Stidhom, 409 U.S. 224, 93 S.Ct. 359, 34 L.Ed.2d 431 (1972), Mr. Justice White, who announced the opinion of the Court, stated in dictum, while upholding the Missouri Court's procedure on determining voluntariness, that:

> This, of course, does not end the matter. A state prisoner is free to resort to federal habeas corpus with the claim that, contrary to a State Court's judgment, his confession was involuntary and inadmissible as a matter of law.
> 409 U.S. at 231

In McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), the Supreme Court dealt with three separate judgments of the Court of Appeals for the Second Circuit which had directed that hearings be held by the respective District Courts on

petitions for habeas corpus. In each case, petitioners alleged that their guilty pleas were motivated by the knowledge that a coerced confession was to be used against them. The Court, rejecting this line of argument stated:

> For the defendant who considers his confession involuntary and hence unusable against him at a trial, tendering a plea of guilty would seem a most improbable alternative. The sensible course would be to contest his guilt, prevail on his confession claim at trial, on appeal, or, if necessary, in a collateral proceeding....
>
> [A] guilty plea in such circumstances is nothing less than a refusal to present his federal claims to the state court in the first instance - a choice by the defendant to take the benefits, if any, of a plea of guilty and then to pursue his coerced-confession claim in collateral proceedings.
>
> 379 U.S. at 768.

TIVIS TROIT HAWKINS, unlike the three petitioners in McMann v. Richardson, did indeed take the course which the Court found would be the "sensible" one for the defendant who considers his confession involuntary and one that was compelled by the knowledge of his innocence, in spite of the well-known risks this "sensible" course entailed. Just as the Court in McMann v. Richardson found that "[n]othing in the train of events suggests that the defendant's plea, as distinguished from his confession is an

involuntary act" there is every reason to believe that the behavior of TIVIS HAWKINS suggests that he believed and acted upon the asserted involuntariness of his confession and upon the knowledge of his innocence. In concluding, the Court again stressed that its reversal of the Court of Appeals orders directing evidentiary hearings was based on the fact, unlike TIVIS HAWKINS, that each of the petitioners had pleaded guilty after making their allegedly coerced confessions:

> A conviction after trial in which a coerced confession is introduced rests in part on the coerced confession, a constitutionally unacceptable basis for conviction. It is that conviction and the confession on which it rests that the defendant later attacks in collateral proceedings. The defendant who pleads guilty is in a different posture. He is convicted on his...admission in open court that he committed the crime charged against him.
> 397 U.S. at 773

Although McMann v. Richardson does not specifically deal with the issue presented in the instant case, its underlying rationale lends support to the position that in the case of TIVIS HAWKINS, who did not plead and who took the stand in his own defense, there is enough credence to his allegations that an evidentiary hearing by the District Court would have been appropriate and should be directed by this Court.

In United States ex rel. Jefferson v. Follette, 396 F.2d

862 (2d Cir. 1968) the principle applied for in the instant case was affirmed. Although the specific challenge to the State procedure was on different grounds, this Court found that although there had been a separate Huntley hearing on the voluntariness of petitioner's confession, it was nevertheless inadequate. Thus the Court held that even though the State Court's findings were supported by the evidence adduced, the material facts were not adequately developed, and directed that a federal habeas corpus hearing be held by the United States District Court for the Southern District.

United States ex rel. Joseph v. La Vallee, 290 F. Supp. 90 (N.D.N.Y. 1968), also represents an instance where in spite of the general interest in comity, the Court found reason to intervene in the State proceedings. In addition to the fact that the reversal of the Second Circuit decision by the Supreme Court in Roberts v. La Vallee, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) (per curiam), had signaled a possible new relationship between State and Federal Courts in relation to federal habeas corpus, the Court found an additional factor to support its grant of the writ:

> In this proceeding...we have another important factor in that the issue in this proceeding under discussion was presented to the Appellate Division and ruled against, [citation omitted] but leave to appeal to the Court of Appeals

was denied and therefore the issue, on its merits, never reached the highest court of New York.

290 F.Supp. at 93.

In Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), the Supreme Court held that while the additional procedural safeguards announced in Escobedo and Miranda did not require retroactive application, "[p]risoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years." 384 U.S. at 730. Thus, in Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963), the Court said that there are "unquestionably attendant circumstances which the accused is entitled to have appropriately considered in determining voluntariness and admissibility of his confession." 373 U.S. at 517. It is just such "attendant circumstances", relating to the voluntariness of his confession, which it is urged must be considered by the federal courts on this habeas corpus petition of TIVIS TROIT HAWKINS.

POINT V

THE WARRANTLESS SEARCH OF TIVIS HAWKINS'S HOME WAS IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS AND THE FACTUAL AMBIGUITY SURROUNDING THE CIRCUMSTNACES OF HIS ARREST MINIMALLY REQUIRED THE DISTRICT COURT TO INDEPENDENTLY DETERMINE THE FACTS.

The Court's decision in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), comprehensively reviewed the role of the federal court in a habeas corpus proceeding. The Court stated, inter alia:

> Although the district judge may, where the State Court has reliably found the relevant facts, defer to the State Court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the State Court fact findings independently. The state conclusions of law may not be given binding weight on habeas. That was settled in Brown v. Allen, 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter).
>
> 372 U.S. at 318.

Yet in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), the Court had pointed out:

> Of course, so-called facts and their constitutional significance may be so blended that they cannot be severed in consideration.
>
> 365 U.S. at 546.

Examples of such "blending" of fact and law can be seen in the present case. Perhaps this is most clearly illustrated by the issue of whether the search of petitioner's home, subsequent to his arrest, was a lawful search incident to a valid arrest. Even assuming, arguendo, that the arrest was based upon sufficient information to meet the standard of probable cause, there is conflicting evidence as to whether petitioner was arrested outside his home as he testifies or as he was standing in his doorway as the arresting officer maintains. Thus, what would seem to be a rather inconsequential detail relative to the general scheme of things and relative to the vast scope of the factual background in this case, becomes critical in determining whether the law was correctly applied as to whether the evidence seized in the defendant's home was properly admitted at trial. The prosecuting attorney in the Respondent's Brief submitted to the State Court on the appellate review of this case, invoked the Supreme Court's decision in Chimel v. California, 395 U.S. 742, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) for the "definitive" law on the permissible area of a search incident to arrest [Respondent's Brief 26; A. 39]. Thus, he cites Chimel for the proposition that the area of search includes, "the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him," (395 U.S. at 768) and then continues to reason that

"a search of the living room to which that door [the doorway in which the appellant was allegedly standing] gave access, was completely permissible.

According to the argument of the District Attorney, if the Appellant was standing in the doorway at the moment of his arrest, the applicable law, as stated in Chimel provides a legal basis for the search, whereas if the petitioner was arrested outside of his home, the search is not lawful since it did not cover the area within the petitioner's control. This line of argument, however, ignores the question of whether the seized evidence was in fact within "the area from...which he might gain possession of a weapon or destructible evidence" - the Chimel standard (395 U.S. at 763), and unfortunately, the decision and opinion of the trial judge denying the motion to suppress the evidence provides no guidance for determining the basis upon which this issue was resolved. Furthermore, there was an additional substantial issue as to the contemporaneousness of the search, since it was not conducted by the arresting officer, but by another officer who had to be called to the scene and came back with the arresting officer after the defendant was removed. In Shipley v. California, 395 U.S. 818, 89 S.Ct. 2053, 23 L.Ed.2d 732 (1969), the Court had stated: "The Court has consistently held that a search 'can be incident to an arrest only if it is substantially contemporaneous with the arrest....'"

395 U.S. at 819.

The decision and opinion of the Court, however, merely restates the testimony on both sides and simply ends with the conclusary statement that:

> Upon the testimony adduced at this hearing the Court finds that the police had reasonable cause to believe that the crime of murder had been committed and that the defendant had committed such crime. Under these circumstances, the arrest of the defendant was lawful and the search was reasonable as incidental to the said valid arrest. The Court concludes that the evidence seized should not be suppressed. [R. 408; A. 40]

Thus, it would appear to be impossible for the Federal Court to fulfill its function of reviewing the State Court's findings of law without rehearsing the factual evidence on which the legal results reached by the trial judge were based. In his brief on appeal to the State Court, the prosecuting attorney had argued, and thus might presumably argue again, that the specific article which is the subject of this "torrent of argument" is "a shirt, that's all, a shirt that was draped on living room couch" [R. 25; A. 41] thereby implying, of course, that it is not worth arguing about. There are, however, two urgent reasons why this seizure by the police without a warrant is very much worth arguing about. The first is that in spite of the District attorney's apparent cavalier

attitude and although it is indeed only one of numerous physical exhibits introducing evidence by the state, it is the only piece of evidence out of all the evidence collected at the scene of the crime, which establishes even a circumstantial link between the appellant and the crime.* The second reason that the police seizure of this shirt which the defendant had casually dropped on his living room couch the night before (in the typical way that people do), must be challenged is that the Fourth Amendment guarantee against unwarranted search and seizure was established for the very purpose of protecting the expectations of privacy in one's home that are reflected by such casual, private bahavior as the appellant's. In Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961), it was held that since the Fourth Amendment's right of privacy was enforceable against the states through the Due Process Clause of the Fourteenth Amendment, it should be enforceable against them by the same sanction of exclusion as is used against the Federal Government; that "no man is to be convicted on unconsti-

---

* It might be a point of collateral interest that it is not even the shirt itself, but rather some napkins presumably found in the pocket of the shirt which establish this circumstantial link with the victim and ironically, these napkins were the only piece of evidence presumably gathered the day of the discovery which were not carefully and separately packaged, sealed and tagged to mark them as to when and where they were discovered.

tutional evidence." Id. at 657. The Court, quoting from Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886) said:

> [T]he doctrines of...[the Fourth and Fifth] Amendments apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offence; but it is the invasion of his indefensible right of personal security, personal liberty and private property....Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime is within the condemnation...[of those amendments].

It is therefore urged that since a serious question is presented in this case as to whether the State court correctly applied the law in regard to the exclusion of evidence illegally seized; and since the legality of the search may depend on the factual issue of whether the defendant stepped outside his house to ask the police what they wante (after his wife had spotted them outside), or whether he remained standing in his doorway, the federal court has a duty to look at this factual issue anew in order to fulfill its function of protecting the appellant's federally guaranteed rights. The Supreme Court in Townsend v. Sain clearly stated the

extent of the obligation of the Federal District Court:

> Even if all the relevant facts were presented in the state-court hearing, it may be that the fact-finding procedure there employed was not adequate for reaching reasonably correct results. If the state trial judge has made serious procedural errors (respecting the claim pressed in federal habeas) in such things as the burden of proof, a federal hearing is required.
>
> 372 U.S. at 316.

Appellant is not challenging the procedure of the suppression hearing as much as he is challenging the fact that the lack of articulated grounds for the decision have made it impossible to ascertain whether the decision was based on a particular interpretation of the facts or the law. Thus, no basis of review is provided; there is no way of determining whether the law was correctly or incorrectly applied.

CONCLUSION

In Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969), the Supreme Court stated:

> The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Since, as Relator-Appellant urges, the State fact-finding procedure did not adequately determine all the underlying factual disputes necessary for a proper application of the law and since there is undisputed evidence on the exiting record that TIVIS HAWKINS was deprived of his rights under the Fourteenth Amendment of the United States Constitution, it is urged that the Court exercise its discretionary powers to grant an evidentiary hearing or authorize the issuance of a writ of habeas corpus forthwith.

Respectfully submitted,

ZANE and ZANE,
Attorneys for Relator-Appellant,
One Rockefeller Plaza,
New York 10020.

(212) 245 - 2222

James L. Zane,

Of Counsel.

~~SUPREME COURT OF THE STATE OF NEW YORK~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of
UNITED STATES OF AMERICA ex rel.
TIVIS TROIT HAWKINS, II,
Relator-Appellant,

-against-

J. EDWIN LAVALLEE, Superintendent,

Respondent-Appellee.

AFFIRMATION OF SERVICE

Docket No. 74-1717

The undersigned attorney, duly admitted to practice in the courts of the State of New York, affirms the following to be true pursuant to CPLR 2106, under the penalties of perjury:

1. That he is a member of ~~associated with~~ the firm of ZANE and ZANE, attorneys for the Relator-Appellant.

2. That on the 5th day of August, 19 74, your affirmant served the within Brief for Relator-Appellant.

upon LOUIS J. LEFKOWITZ, Attorney General,

attorney(s) for Respondent-Appellee,

at Two World Trade Center, New York, New York

the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same to each attorney enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: August 5, 1974.
New York, New York.

James B. Zane

JAMES B. ZANE